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In The

Supreme Court of the United States

October Term, 1993

SILVIA S. IBANEZ,

Petitioner,

v.

STATE OF FLORIDA,
DEPARTMENT OF PROFESSIONAL REGULATION,
BOARD OF ACCOUNTANCY,

Respondent.

On Writ Of Certiorari To The District Court Of Appeal Of Florida First District

BRIEF OF AMICUS CURIAE THE FLORIDA BAR IN SUPPORT OF PETITIONER

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CONSENT OF THE PARTIES

Petitioner, Silvia S. Ibanez, and Respondent, State of Florida, Department of Professional Regulation, Board of Accountancy, have consented to the participation of The Florida Bar in these proceedings as Amicus Curiae in support of Petitioner. Their consents have been filed with the Court. Accordingly, The Florida Bar respectfully requests that this Court accept this Amicus Curiae Brief.

INTEREST OF AMICUS CURIAE

The Supreme Court of Florida is the sole regulatory body overseeing Florida lawyers. In 1949, the Court

established a unified bar pursuant to its inherent judicial power to regulate the conduct of those lawyers practicing in Florida courts. *In re Petition of Florida State Bar Association*, 40 So. 2d 902 (Fla. 1949).[1] Pursuant to this authority, the Supreme Court of Florida adopted the Rules Regulating The Florida Bar and established The Florida Bar as an official arm of the Court. Rule 1-1, The Florida Bar, Rules Regulating The Florida Bar. The stated purpose of The Florida Bar is "to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence." *Id.* Rule 1-2. Subject to the direction, supervision and control of the Supreme Court of Florida, the Board of Governors of The Florida Bar is given the authority and responsibility to govern and administer the Bar and to take such action as it may consider necessary to accomplish its stated purpose. *Id.* Rule 1-4.2. The officers of The Florida Bar consist of the President, President-Elect and the Executive Director. *Id.* Rule 1-5.1.

In addition the Bar is authorized to establish those committees that it deems necessary to accomplish the purposes of the Florida Bar. *Id.* Rule 1-4.3. Pursuant to this authority, the Bar established the Standing Committee on Relations Between The Florida Bar and Institute of CPAs in order "to provide an effective means of communication between The Florida Bar and the Institute of CPAs with respect to issues of common interest." While fulfilling its designated functions, this Committee became aware of the issues pending in the instant action. It undertook discussions with the Florida Institute of CPAs

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[1] At least 36 jurisdictions have unified bars while 18 jurisdictions remain voluntary. Although each jurisdiction differs in its stated function, The Florida Bar considers its mandatory core functions to be lawyer discipline, administration of a client protection fund, prevention of lawyer substance abuse, and implementing mandatory continuing legal education. *Unified State Bars/The Florida Bar*, The Florida Bar, Bar-Related Issues, Background Papers (Sept. 1993).

to seek its support for amendments to, or clarification of, the Board of Accountancy's "holding out" rules and other rules affecting those members of The Florida Bar who hold dual licensure as both lawyers and CPAs. Despite extensive efforts to achieve a consensus, the Institute remained adamant in its support of the Board of Accountancy's position herein.

At the request of the Chair of this Committee, the Bar's Executive Committee approved, and the Board of Governors ratified, the filing of an Amicus Curiae brief in the instant matter in support of Ibanez and to express the Bar's views regarding these important commercial speech and professional regulatory issues.

SUMMARY OF ARGUMENT

The decision of the District Court of Appeal of Florida, First District, which affirmed without opinion the Florida Board of Accountancy's decision to discipline Ibanez for disclosing in her yellow page attorney advertising and on her business card the fact that she is a licensed Florida CPA and a certified financial planner (CFP), should be overturned. As an attorney, Ibanez is subject to regulation by the Florida Bar, an arm of the Supreme Court of Florida. As a result, she is guided by certain aspirational, mandatory, and permissive rules regarding the scope of her practice and the type, nature, and content of her attorney advertising. Pursuant to these rules, Ibanez is expected to draw on all her relevant training, knowledge, and experience in handling clients' legal problems. In addition, she is permitted to publicly disclose any background, education, training, and experience that would be relevant to a client's decision to retain her services. This specifically includes the right, and, in certain circumstances the obligation, to advise potential clients of any technical and professional licensure or educational achievement she has obtained beyond her legal training and licensure. Under The Florida Bar's attorney

advertising rules, disclosure of the CPA and CFP credentials are permitted and are not misleading, false, deceptive or unfair under the circumstances presented. The Board of Accountancy's finding that Ibanez has violated the Board's advertising rules by disclosing in her attorney advertising that she is a CPA and a CFP is contrary to these principles and should be overturned.

Finally, the Board's decision violates those principles of the First Amendment that not only protect truthful commercial speech but also promote the dissemination of relevant, truthful information in furtherance of the public's economic and personal interests. In addition, the Board's suggestion that whenever lawyer-CPAs disclose information regarding their CPA licensure to the public it subjects each attorney's law firm to the rules regulating the practice of accounting firms is flawed. Although not specifically enforced in the Board's order, this concept has the potential to seriously affect the ability of lawyers to practice their trade without interference from the legislative and executive branches in Florida.

ARGUMENT

A. THE BOARD OF ACCOUNTANCY'S DECISION CONFLICTS WITH RULES OF THE FLORIDA BAR RELATED TO A LAWYER'S DISCLOSURE OF RELEVANT BIOGRAPHICAL INFORMATION AND THE ADVERTISING OF LEGAL SERVICES

1. Lawyers Provide More Than Technical Legal Advice

Chapter 4 of the Rules Regulating the Florida Bar encompass the Rules of Professional Conduct for its

members. The Rules explicitly recognize that lawyers perform broad functions for their clients as advisors, advocates, negotiators, intermediaries, and evaluators. The preamble to this Chapter states:

> A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.
>
> As a representative of clients, a lawyer performs various functions. As an advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As an advocate, a lawyer zealously asserts the client's position under the rules of the advocacy system. As a negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As an intermediary between clients, a lawyer seeks to reconcile their interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as an evaluator by examining a client's legal affairs and reporting about them to the client or to others.
>
> * * *
>
> Lawyers are officers of the court and they are responsible to the judiciary for the propriety of their professional activities. Within that context, the legal profession has been granted powers of self-government. Self-regulation helps maintain the legal profession's independence from undue government domination. *An independent legal profession is an important force in preserving government under law, for abuse to legal authority is more readily challenged by a profession whose members are not dependent on the executive and legislative branches of government for the right to practice. Supervision by an independent judiciary, and conformity with the rules the judiciary adopts*

for the profession, assures both independence and responsibility.

(Emphasis added) Chapter 4, Preamble, The Florida Bar, Rules of Professional Conduct. As these comments reveal, The Florida Bar is committed to an independent judiciary and legal profession and, therefore, opposes legislative or executive actions that impinge on that independence. The Board's order below is such an action.[2]

Under Rule 4-2, relating to a lawyer's role as counselor, Rule 4-2.1 entitled "Adviser" states:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, *a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.*

Rule 4-2.1, The Florida Bar, Rules of Professional Conduct (emphasis added).

The comments to this Rule, which address the scope of a lawyers advice, further state:

> A client is entitled to straightforward advise expressing the lawyer's honest assessment. . . .
>
> Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. . . .
>
> A client may expressly or impliedly ask the lawyer for purely technical advice. . . . When such a request is made by a client inexperienced

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[2] The Florida Bar also officially opposes any amendments to the Florida Constitution which would alter the authority of the Supreme Court of Florida to regulate the admission of persons to the practice of law or discipline those persons admitted.

in legal matters, however, the lawyer's responsibility as adviser may include indicating that more may be involved than strictly legal considerations.

Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology, or social work: *business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.*

Rule 4-2, Comments, The Florida Bar, Rules of Professional Conduct (emphasis added).

Based upon these principles, which are applicable to all members of The Florida Bar, it is clear that a competent lawyer is more than just an advocate for a client hired to render technical legal advice, a lawyer is also an adviser, an evaluator, and a consultant. In order to perform these functions, lawyers are required to utilize the full range of their skills and knowledge on relevant topics, and not limit themselves to purely technical legal advice. Accordingly, lawyers who hold dual licensure as both attorneys and CPAs (or any other licensed professionals) must be able to provide their clients, within their recognized law practices, complete services of the nature and quality recognized as appropriate by The Florida Bar.

Within its Final Order, The Board of Accountancy has correctly recognized that with the exception of the "attest" function, defined as the independent opining of the truth and accuracy of financial statements, "all other activities of certified public accountants are activities

which are not prohibited to any non-CPA in the State of Florida." Ibanez did not provide any attestation services in conjunction with her law practice. The Board's finding that certain services she did provide were similar to those provided at the accounting firms where she worked before becoming a lawyer is irrelevant in this proceeding. By the Board's own admission, those services can be performed by non-CPAs, including attorneys. Furthermore, the record reflects Ibanez advised potential clients that she does not provide accounting services, but rather is a lawyer-CPA providing legal services. The fact that she possesses an active CPA license and discloses this fact in her attorney yellow page advertising and business cards, suggests nothing more than educational achievement and professional recognition in another field. This training, knowledge and experience is extremely relevant to the areas of law in which she has chosen to practice.

The Board's speculation that the public will be misled by the CPA designation because Ibanez does not license her firm as a CPA firm or limit the ownership of her firm to other CPAs is simply unsupported by the record and an unwarranted interference with the power of Florida's judiciary to regulate lawyers and with the free speech rights of lawyers to truthfully disclose their verifiable credentials and accomplishments in the advancement of their practices.[3]

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[3] Although this Brief will only generally address the issue of the application of the Board's Rules to a law firm, it is important to note that the Rules referred to in the Board's Order regarding contingency fee prohibitions and other firm organizational matters are contrary to those practices allowed by the Supreme Court of Florida. The Rules also improperly inject the Board, an executive body established by the legislative branch, into the regulation and control of persons traditionally subject solely to judicial oversight. This raises serious separation of powers issue that are outside the scope of this Brief but which will arise in the future should the Board threaten action against

2. The Florida Bar's Rules Regarding Advertising Permit Disclosure of Relevant Professional Licensure

The Florida Bar's lawyer advertising rules permit lawyers to discuss their CPA and CFP credentials in print advertising and business cards. A lawyer's responsibilities regarding information about legal services and advertising of those services to the public are set forth in Rule 4.7. As stated in Rule 4-7.1:

> A lawyer shall not make or permit to be made a false, misleading, deceptive, or unfair communication about the lawyer or the lawyer's services. A communication violates this rule if it:
>
> (a) contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading;
>
> (b) is likely to create an unjustified expectation about the results the lawyer can achieve or states or implies that the lawyer can achieve results by means that violate the Rules of Professional conduct or other law;

Rule 4-7.1, The Florida Bar, Rules of Professional Conduct. This Rule is similar to the Board of Accountancy rule under which Ibanez was disciplined. Rule 61H1-24.001, Fla. Admin. Code (formerly Rule 21A-24.001, Fla. Admin. Code)[4]. Nevertheless, the Board

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law firms whose members are dual licensed and who append the CPA designation in any publicly disseminated information.

[4] The Board ruled that Ibanez violated its rule prohibiting false or misleading advertising, Rule 61H1-24.001(2), which defines "advertising", including disclosures in business cards and letterheads, to be dissemination to the public of any statements "with the intent of furthering the purpose, either directly or indirectly, of *selling public accounting services, or offering to*

does not apply its Rule in a manner similar to The Florida Bar which specifically allows Ibanez to disclose her CPA and CFP credentials. Indeed, the Bar's Rules contemplate that Ibanez must provide this information to prospective clients (if relevant). As stated in Rule 4-7.3(a):

> (a) Information Regarding Qualifications. Each lawyer or law firm that advertises the lawyer's or law firm's availability to provide legal services shall have available in written form for delivery to any potential client:
>
> (1) *a factual statement detailing the background, training, and experience of each lawyer or the law firm;*
>
> (2) if the lawyer or law firm claims special expertise in the representation of clients in special matters or publicly limits the lawyer's or law firm's practice to special types of cases or clients, written information setting forth the *factual details of the lawyers experience, expertise, background, and training in such matters.*

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perform public accounting services, or inducing members of the public to enter into any obligation relating to such public accounting services." Id. (emphasis added). Although rejected by the Board, the evidence before the hearing officer was that Ibanez was diligent in advising potential clients that she was performing legal services and not accounting services. It is only through the application of the now invalid "holding out" rule, which the Board concedes was promulgated to address the judicial concerns raised regarding the overbreadth of the statutory definition of the practice of public accounting, that the Board exercised jurisdiction. Even assuming that the interplay of the statute and rules allows the Board to enforce an advertising ban on what it technically considers to be accounting services, which itself is doubtful, this regulatory presumption is unsupported by the facts and raises serious constitutional concerns regarding the application of the Board's Rules to the dissemination of relevant and truthful information regarding lawyers.

Rule 4-7.3(a), The Florida Bar, Rules of Professional Conduct. (Emphasis added). Rule 4-7.3(b), provides that the information noted above *must* be enclosed within any written communication that advertises a lawyer's services. Subsection (c) of the Rule provides that whenever a potential client requests "information regarding a lawyer or law firm for the purpose of making a decision regarding the employment of the lawyer or law firm," the lawyer or law firm shall promptly supply the information required above. In addition, the lawyer or law firm:

> may furnish such additional factual information regarding the lawyer or law firm deemed valuable to assist the client.

Rule 4-7.3(c)(2), The Florida Bar, Rules of Professional Conduct. Furthermore, subsection (f) of this Rule states that:

> Any factual statement contained in any advertisement or written communication or any information furnished to a prospective client under this rule shall not:
>
> (1) be directly or impliedly false or misleading;
>
> (2) be potentially false or misleading;
>
> (3) fail to disclose material information necessary to prevent the information supplied from being actually or potentially false or misleading;
>
> (4) be unsubstantiated in fact; or
>
> (5) be unfair or deceptive.

Rule 4-7.3(f), The Florida Bar, Rules of Professional Conduct.

As these Rules reveal, the Florida Bar has an interest similar to the Board of Accountancy in protecting the public from deceptive advertising. The Florida Bar believes, however, that clients and prospective clients are entitled to full disclosure of relevant factual information regarding a lawyer, including factual details of a lawyer's experience, expertise, background and training. As the comments to the foregoing Rule state:

> Consumers and potential clients have a right to receive factual, objective information from lawyers who are advertising their availability to handle legal matters. The rule provides that potential clients may request such information and be given the opportunity to review that information without being required to come to a lawyer's office to obtain it. *Selection of appropriate counsel is based upon a number of factors. However, selection can be enhanced by potential clients having factual information at their disposal for review and comparison.*

Rule 4-7.3, Comments, The Florida Bar, Rules of Professional Conduct (emphasis added).

The Florida Bar's position is that because the prospective client makes the ultimate decision on hiring and retaining a lawyer, it is important to give the prospective client relevant factual information about each lawyer in order for the client to make an informed choice.[5] Although the Bar, like the Board, is concerned with even the potential to mislead the public, that concern does not

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[5] Under the Board of Accountancy's Rules, a *"client"* is defined as a person or entity "which *retains a licensee for the performance of accounting services.*" Rule 61H1-20.003, Fla. Admin. Code. (Emphasis added). This last phrase is not defined in the accounting statutes or Rules. It is only by virtue of the use of the designation "CPA" that the Board even suggests that Ibanez "technically" provided accounting services and is engaged in the practice of public accounting. The record reveals that no "clients" of Ibanez retained her to perform accounting services. To the contrary, they retained her to provide legal services. Indeed, it is illogical to suggest that the public is misled about the services Ibanez offers to provide when she does not advertise in the "accountants" section of the yellow pages but instead was disciplined for her advertisement in the "attorneys" section of the yellow pages. The implicit assumption that a prospective client seeking accounting services would look in the lawyer section of the yellow pages is not well-founded.

require a total prohibition on the truthful disclosure of multiple licensure. Although most advertisements of lawyers are subject to prior filing, evaluation, and approval under Bar Rule 4-7.5, the Rule also provides that:

> Any advertisement in any of the public media, *including the yellow pages of telephone directories,* that contain no illustrations and no information other than set forth in rule 4-7.2(n)(1)-(8) [is exempt from filing and approval requirements.]

Rule 4-7.5, The Florida Bar, Rules of Professional Conduct. (Emphasis added). Subsections(n)(1)-(9) of Rule 4-7.2 define the permissible contents of advertising, which if included in advertisements and written communication, are presumed *not* to be false, misleading, deceptive or unfair communication under Rule 4-7.1, The Florida Bar, Rules of Professional Conduct. This Rule specifically includes disclosure of:

> technical and professional licenses granted by the state or other recognized licensing authorities and educational degrees received, including dates and institutions.

Rule 4.-7.2(n)(3), The Florida Bar, Rules of Professional Conduct. Thus, The Florida Bar's Rules specifically permit Ibanez to disclose her CPA and CFP licensure and certifications. As discussed above, in certain circumstances, this type of biographical information must be disclosed when requested by a client or prospective client.[6]

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[6] Under the prior Code of Professional Responsibility, specifically, DR 2-102, lawyers with other professional licensure must conduct their practices from offices that were functionally and geographically separate, and could not disclose additional registration or licensure on their letterhead, business cards or office doors. As of July 1979, however, this provision was deleted. Thus, under the old Code, and the current Rules of Professional Conduct, which are patterned after the ABA model Rules of Professional Conduct, this type of dual practice and disclosure of the dual practice is no longer prohibited. *See* Op.

B. PUBLIC POLICY CONSIDERATIONS FAVOR IBANEZ' FIRST AMENDMENT COMMERCIAL SPEECH RIGHTS

The Florida Bar supports Ibanez' arguments that this Court's contemporary commercial speech precedents sustain her right to publicly display her professional credentials. The Bar will not reiterate the constitutional principles of *Bates* and its progeny that the favor disclosure of truthful, verifiable information. The Bar, however, presents two public policy considerations that lend further support for Ibanez' position that she has a commercial speech right to list her CPA and CFP credentials in her attorney advertising and on her business card.

1. The Economic Value of Truthful and Verifiable Information About Professional Credentials

The contemporary commercial speech doctrine reflects a policy in favor of accurate information in a consumer-oriented society.[7] Consumers, businesses, and governmental decision-makers (including the judiciary) all increasingly demand the prompt provision of relevant information in their daily operations. The primary goals of information are to facilitate decision-making and to channel resources into their most productive uses.[8] Information forms the basis for not only personal and business

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79-3, Professional Ethics of the Florida Bar; *see also*, Op. 88-9 Professional Ethics of the Florida Bar. Moreover, the Board of Accountancy continues to have this type of prohibition on the structure of a CPA's practice within its Rules. Rule 61H1-26, Fla. Admin. Code.

[7] Terry Calvani, James Langenfeld, & Gordon Shuford, *Attorney Advertising and Competition at the Bar*, 41 *Vand. L. Rev.* 761, 774-78 (1988); Scott D. Makar, *Advertising Legal Services: The Case for Quality and Self-Laudatory Claims*, 37 *U. Fla. L. Rev.* 969, 982-991 (1985) (discussion of *Bates* and its progeny).

[8] Makar, *supra* note 7, at 991; Ronald Coase, *Advertising and Free Speech*, 6 *J. Legal Stud.* 1 (1977).

decisions but also enables the differentiation of professional services and relationships. For these reasons, public policy favors the disclosure of truthful, relevant and verifiable information.[9]

In this regard, consumers of legal (and non-legal) services are increasingly more sophisticated and have a greater understanding of the inherent limitations of advertising (e.g. limited information due to time and space restrictions). In seeking legal services, consumers search for indicia, such as professional credentials, that differentiate between providers of professional services, and provide a better description of lawyers' capabilities.[10] The ability to convey one's professional credentials is also important in service industries because of the personal nature of the relationship with the consumer.

For instance, Ibanez' inclusion of the CPA designation in her telephone listing in the "Attorney" section of the Yellow Pages does not appear to be for the purpose of holding herself out as a practicing CPA who provides accounting services to the public. Instead, the CPA credential provides truthful information to consumers of legal services that Ibanez has a professional background in public accounting. The value of the CPA credential to consumers of legal services is that it signifies the attorney has also met the training and continuing education requirements for obtaining and maintaining the CPA

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[9] *See* George Stigler, *The Economics of Information*, 69 *J. Pol. Econ.* 213 (1961) (advertising tends to lower prices and stimulate competition); *Peel v. Attorney Reg. & Disciplinary Com'n*, ___ U.S. ___, 110 S. Ct. 2281, 2292 (1990) ("disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is a concealment of such information.").

[10] *See generally* Nelson, *Information and Consumer Behavior*, 78 *J. Pol. Econ.* 311 (1970) (consumers search for information on products and services in many ways such as acquiring information through direct product/service utilization, reputation, or advertising).

license. This information is valuable particularly to consumers seeking to hire an attorney for a business, estate, or financial problem. These consumers may prefer an attorney who understands complex concepts and subjects in which CPAs must demonstrate competence to keep their licenses active such as present value, accounting practices, depreciation policy, ledger maintenance, cash flow analysis, income statements and balance sheets, capitalization review, and leverage theory. Use of the brief CPA designation conveys a significant amount of information about the accounting background and abilities of the attorney who has attained the credential. The credential provides this information with low search costs to consumers who wish to avoid contacting each prospective attorney to obtain this information.[11]

An indicator of the economic value of professional credentials is reflected in attorney listings in publications and databases such as Martindale-Hubbell and West's Legal Directory. Attorney listings in these publications routinely contain non-legal professional credentials and licensure in non-legal professions. For example, the listing of Florida attorneys in Martindale-Hubbell contains approximately 382 attorneys who indicate they are current or past holders of a CPA license or are affiliated with a CPA-related organization.[12] Similarly, the listing of Florida attorneys in the West Legal Directory contains approximately thirty-six attorneys who are current or past holders of a CPA license or are affiliated with a CPA-

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[11] Nelson, *Advertising as Information*, 82 *J. Pol. Econ.* 729, 729-31 (1974).

[12] Lexis, Martindale-Hubbell Library, FLDIR file, February 22, 1994 (search ("CPA" or "C.P.A." "certified public account!")). This search also found 310 attorneys under the "professional biography" listings for law firms. These attorneys, however, are probably duplicative of the individual attorney listings in large part.

related organization.[13] Notably, the West database has a specific entry where attorneys can list areas in which they are "Certified." Although the actual percentage of all attorney-CPAs who disclose their CPA credential in these publications is unknown,[14] the absolute numbers reflect that the credential or affiliation is an important piece of information to consumers and potential consumers of their legal services.

Unreasonable advertising restrictions can potentially reduce the availability of relevant information that consumers desire. For this reason, broad prohibitions on categories of relevant, truthful information, such as the Board of Accountancy's ban on attorneys' use of the CPA and CFP credentials, can have adverse economic effects. Without access to information on an attorney's non-legal credentials, consumers incur the risk of selecting an attorney without such important attributes. The Board of Accountancy's broad prohibition also may cause consumers seeking attorneys with non-legal credentials to turn to more costly and inefficient media of communication such as direct personal contacts and word-of-mouth. In contrast, a rule permitting disclosure of truthful, verifiable credentials allows the dissemination of relevant

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[13] West Legal Directory, Florida database, February 2, 1994 (search (CPA C.P.A. "certified public account!")).

[14] The Board of Accountancy's prohibition may have a chilling effect that caused some attorneys not to list their CPA or CFP credentials. For this reason, some attorneys may indirectly infer they are CPAs by listing membership in an association of CPAs but not specifically listing their CPA credential. In addition, the Martindale-Hubbell and West Legal Directory databases both provide attorneys with the choice of abbreviated or full listings (the latter being more expensive). Many attorneys choose the abbreviated listings due to cost considerations. Because the abbreviated listings do not list CPA or other certifications, attorney-CPAs who are listed there were not identified in the searches.

information that consumers would otherwise have difficulty obtaining individually.[15]

For these reasons, although the Board of Accountancy has a significant interest in regulating false, misleading or deceptive advertising, it cannot justify a total ban on all uses of the CPA and CFP designations that are truthful and verifiable. For instance, the CPA designation has both a certification purpose and an informational purpose. The Board has a strong interest in ensuring that individuals who use the CPA designation have, in fact, met the educational and examination requirements to be a state-certified public accountant. The Board, however, has a much lesser interest in regulating individuals who, having met the certification requirements, wish to inform others of their CPA status.

2. The Board of Accountancy's Position That Lawyer-CPAS Who Display Their CPA Designation or Who Provide Accounting Services Other Than the Attest Function Must License Their Law Practices as CPA Firms is Flawed

The Board of Accountancy's position that lawyer-CPAs who display their CPA designation, or who provide accounting type services other than the attest function, must license their practices as CPA firms demonstrates the overbreadth of the Board's reach in this action. Neither Ibanez' commercial use of her CPA credential nor

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[15] *Edenfield v. Fane*, ___ U.S. ___, 113 S. Ct. 1792, 1798 (1993) (total ban on direct solicitation prevents "broad access to complete and accurate information that First Amendment coverage of commercial speech is designed to safeguard.") *See generally* Lori B. Andrews, *Lawyer Advertising and the First Amendment*, 1981 *Am. B. Found. Res. J.* 967 (attorney advertising restrictions can impede effective advertising and interfere with the provision of truthful information about the nature, availability and cost of legal services).

her provision of accounting services any non-CPA could provide forms a basis for subjecting her legal practice to licensure by the Board as a CPA firm.

First, there is only one professional function which must be provided solely by CPAs in Florida: the "attest" function.[16] As stated in the Board's Final Order, "with the exception of the attest function, all other actions of certified public accountants are activities which are not prohibited to any non-CPA in the State of Florida." The Board has a keen interest in ensuring that only CPAs perform this function and that it is performed with independence and integrity. Rule 61H1-21.011, Fla. Admin. Code. This is the only function of a CPA that is inconsistent with the lawyer's role as an advocate.

Based on the record, neither Ibanez nor her law firm perform the attest function. Nonetheless, the Board of Accountancy places great weight on the fact Ibanez provides substantially the same services to the public in her law firm that she provided while she worked as a CPA for the accountancy firms of Coopers and Lybrand and Main Hurdman. The Board lists these services as:

> All types of tax services; including preparing tax opinions; representing clients before the IRS; evaluating the tax consequences of specific transactions and providing her clients with financial counseling and planning.

Conspicuously absent from the list of services is the attest function – the one function by the Board's own definition must only be performed by licensed CPAs.

Tax practice is a specific example of professional overlap and demonstrates the overbreadth of the Board

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[16] The attest function is defined as the independent opining on the truth and accuracy of financial statements, and is a function which is specifically permitted to be performed only by certified public accountants. Section 473.322(1)(c), Fla. Stat. (1993).

of Accountancy's regulatory efforts.[17] Tax law, which is based on Federal and state legislation, regulation, and

[17] Under Rule 61H1-21.002, Fla. Admin. Code, the standards regarding a CPA's objectivity and independence are relaxed. As stated: "In tax practice a licensee may resolve doubt in favor of his client as long as there is reasonable support for his position." Thus, in a tax practice a CPA can become an "advocate" for the client's position if supported by a reasonable interpretation of relevant tax laws and regulations. In addition, under the rules relating to continuing education requirements for CPAs, Rule 61H1-33 Fla. Admin. Code, courses qualifying for credit consist of separate categories for accounting and auditing subjects, which include financial accounting and accounting for specialized industries, general auditing theory and practice, auditing for specialized industries and audit applications to computers and information systems. In addition to the accounting and auditing credits, there are classifications for taxation and general business credits and behavioral subjects. These other categories consist of taxation; management services and management advisory services; oral and written communication; general business, which includes "economics, the social environment of business, *business law*, marketing, finance, quantitive applications of business and business policy and computers and information systems (without audit application); and administration of public accounting practice, including behavioral science, managerial effectiveness and management by objectives." Rule 61H1-33.003, Fla. Admin. Code. In addition, with respect to the attest function, there are generally accepted auditing standards, standards for accounting and review services; generally accepted accounting principles, and standards for governmental auditing. However, there are separate standards for prospective financial statements, standards for management advisory services, standards for tax practice, as well as standards for attorneys providing litigation support services. These non-auditing standards do not express the same concern for objectivity and independence and are not nearly as strict upon the practice of CPAs as the accounting and auditing standards. *See generally* Rule 61H1-20, Fla. Admin. Code. Thus, even under the Board of Accountancy's own standards, the

common law, is a complex and interdisciplinary web of legal and accounting concepts. For instance, an entire section of the Internal Revenue Code, Subchapter E, Sections 441 through 444 is entitled "Accounting Periods and Methods of Accounting." Providing advice on and interpretation of this Subchapter is as much, if not more, the province of tax attorneys rather than CPAs. As such, the specified list of tax services performed by Ibanez as a CPA for Coopers and Lybrand and Main Hurdman could arguably be better characterized as legal rather than accounting services. The Board of Accountancy's argument that the public needs the Board's protection from law firms practicing their own stock in trade reveals the flaw in the Board's efforts to censure one of its licensees for simply disclosing to the public the fact of her dual licensure.

In sum, law firms in Florida are not subject to licensure by the Florida Board of Accountancy. Rather, law firms are subject to regulation by The Florida Bar. Florida law firms and lawyers cannot perform the attest function, only CPA firms and CPAs can. It is common for law firms to engage in tax law practices, which under the complexities of the Internal Revenue Code involve knowledge and use of accounting skills. However, other than the attest function, all other functions of a CPA can be performed by a non-CPA. Although individual CPAs must be licensed by the Board of Accountancy, the Florida Legislature did not intend for law firms to be licensed as accounting firms when they engage in those activities which can be performed by non-CPAs.

CONCLUSION

The decision of the Board of Accountancy to discipline Ibanez for truthfully revealing her relevant professional credentials is contrary to the policy of The Florida

concerns expressed by the Board in disciplining Ibanez simply do not exist outside the context of the attest function.

Bar and violates Ibanez' commercial speech rights. For these reasons and those expressed above this Court should quash the decision of the District Court of Appeal of Florida, First District, with instructions to vacate the Board's ruling.

Respectfully submitted,

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